Supreme Court, U.S.
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No. 94-1963

In The

Supreme Court of the United States

October Term, 1994

JILL NESLADEK, as Trustee for the Heirs and Next of Kin of Jeremy J. Nesladek, Decedent,

Petitioner,

vs.

FORD MOTOR COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

WILLIAM H. McDONALD
WOOLSEY, FISHER, WHITEAKER & McDONALD
300 South Jefferson
Suite 600
P.O. Box 1245
Springfield, MO 65801
(417) 869-0581

DAVID F. HERR
MASLON EDELMAN BORMAN & BRAND, a Professional Limited Liability Partnership
3300 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-4140
(612) 672-8350

ERIC W. KRUGER
Counsel of Record
RICKERSON & KRUGER
11422 Miracle Hills Drive
Suite 401
Omaha, NE 68154-4459
(402) 498-8686

Of Counsel:

STEPHEN R. McALLISTER
UNIVERSITY OF KANSAS SCHOOL OF LAW
Green Hall
Lawrence, Kansas 66045
(913) 864-4550

Attorneys for Petitioner

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit violated the *Erie* Doctrine by creating federal common law relative to forum shopping?

2. In diversity cases, when certification of state law questions is an available option, whether federal courts should be given any discretion to decide unresolved and potentially dispositive questions of state law?

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FURTHER REASONS FOR GRANTING THE WRIT

I. This Case Cleanly Raises Important, Unresolved And Recurring Federalism Issues.

Simply put, this case raises fundamental questions regarding the relationship between the federal and state courts in our system of federalism. In this case, petitioner attempted to pursue a products liability claim against Ford Motor Company, the respondent, in the state courts of Minnesota. Ford removed the case to federal district court. Because the accident which killed petitioner's young son occurred in Nebraska, the case presents a classic choice of law question. Petitioner, who sought a state forum in the first instance, moved the district court to certify potentially dispositive Minnesota choice of law questions to the Minnesota Supreme Court. Ford opposed that request, urging the district court to make its own interpretation of Minnesota law and, in particular, to condemn what Ford claimed was petitioner's forum shopping. The district court denied petitioner's motion to certify questions of Minnesota law to the Minnesota Supreme Court and granted Ford's motion for summary judgment. *Nesladek v. Ford Motor Co.*, 876 F. Supp. 1061 (D. Minn. 1994) (Pet. App. 44a - 60a).

Petitioner renewed her motion to certify potentially dispositive questions of Minnesota state law in the Eighth Circuit which, like the district court, denied the request. Pet. App. 25a. The Eighth Circuit majority[1] instead, like the district court,

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1. The Eighth Circuit panel divided 2 - 1, although one would hardly know that from reading Ford's Brief in Opposition in this Court (hereinafter "Br. in Opp."). Indeed, Ford states only in a footnote that "Judge Lay dissented as to application of the Leflar factors." Br. in Opp. 10 n. 3. Apart from barely mentioning Judge Lay's dissent, Ford has completely mischaracterized Judge Lay's reasons for dissenting. Judge Lay did not simply disagree with the majority's "application" of the Leflar factors, unless one views a dispute about

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applied its own views in resolving the Minnesota choice of law question. *See Nesladek v. Ford Motor Co.*, 46 F.3d 734 (8th Cir. 1995) (Pet. App. 2a - 15a). Ignoring considerable contrary Minnesota precedent,[2] the majority focused on petitioner's alleged forum shopping in concluding that her claim necessarily should be governed by Nebraska, and not Minnesota, law.[3] Moreover, the majority relied in part upon the Minnesota Court of Appeals decision in *Lommen v. City of East Grand Forks*, 522 N.W.2d 148 (Minn. Ct. App. 1994), a Minnesota choice of law case in which the Minnesota Supreme Court granted review almost two months before the Eighth Circuit rendered its decision in this case.

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whether the Minnesota courts would even consider the first three Leflar factors (the majority said yes, Judge Lay said no) as a dispute over "application" of those factors in this case. The core of the dispute in this case is not the application of the Leflar factors to the facts of this case but rather the *legal* standard the Minnesota courts would apply in resolving the choice of law issue, *i.e.*, which of the Leflar factors the Minnesota courts would deem relevant to the choice of law inquiry in a products liability case.

2. *See* Pet. App. 15a - 24a. Judge Lay's dissent quotes, discusses and cites numerous Minnesota cases contrary to the position the Eighth Circuit majority adopted. Ford's assertion that "Petitioner plays fast and loose with the Minnesota cases," Br. in Opp. 18, therefore, is nothing less than an assertion that Judge Lay, who agreed with petitioner's reading of Minnesota law, also played "fast and loose" with the cases.

3. Contrary to Ford's suggestion that "petitioner's forum shopping did not play the 'decisive' role in the ruling below," Br. in Opp. 18, the Eighth Circuit majority's opinion relied on two of the Leflar factors—maintenance of interstate order and advancement of the forum's governmental interests—in ruling in Ford's favor. With respect to each factor, it is clear from the opinion that the determinative consideration was petitioner's alleged forum shopping. *See* Pet. App. 11a, (forum shopping is "a practice that undercuts the maintenance of interstate order"), 13a ("Because of the distinct presence of forum shopping in this case, we have good reason to conclude that the balance of interests favors application of Nebraska law.").

Thus, the case presents a common situation encountered by the lower federal courts. A tort suit is commenced in state court. The defendant removes the case to federal court. The substantive issues in the suit are governed by state law but the state law is uncertain or unsettled. One or more of the parties request the federal court to certify potentially dispositive questions of state law to the state supreme court. How should a federal court resolve such a request? What standards apply? How does the *Erie* doctrine affect the federal court's determination? These are the questions presented in the petition for a writ of certiorari.

Ford Motor Company's lengthy and caustic Brief in Opposition, prepared by its well-known counsel, is an understandable effort to obscure the fundamental *federalism* issues that underly this case. Ford opines at length on Minnesota choice of law principles and their application to this case. *See* Br. in Opp. 4 - 22. But petitioner's first question presented is not a question of Minnesota law. Rather, petitioner raises the question whether a federal court may impose its own views regarding possible forum shopping on the parties in federal diversity cases that are governed (substantively) by state law. Similarly, petitioner's second question presented raises a host of unresolved issues regarding the propriety of federal courts utilizing available procedures for certifying unsettled and dispositive questions of state law to the appropriate state court.

Ford contends that this Court determined—apparently once and for all—the standards to govern the certification of questions of state law in *Lehman Bros. v. Schein*, 416 U.S. 386 (1974). That clear standard is that the decision "'rests in the sound discretion of the federal court.' " Br. in Opp. 23 (quoting *Lehman Bros.*, 416 U.S. at 391. Although this Court has not revisited the standard established in *Lehman Bros.*, it repeatedly has emphasized the benefits of federal courts utilizing the certification process. *See, e.g., Bellotti v. Baird*, 428 U.S. 132, 150-51 (1976); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J.,

concurring); *City of Houston v. Hill*, 482 U.S. 451, 475 (1987) (Powell, J., concurring in part and dissenting in part). Nonetheless, the empirical evidence suggests, if not establishes, that there is nothing simple or clear about the guidance that *Lehman Bros. v. Schein* alone provides to the lower federal courts.

For instance, a recent American Judicature Society report on the federal courts' use of the certification process concluded that "[t]he data, based on a WESTLAW search of all cases published since 1990, indicate that the 11th Circuit has by far certified the most questions (47) of any federal Circuit, with the 9th Circuit certifying the next largest number of questions (23)." Jona Goldschmidt, *Results of a National Survey of Federal Judges and State Supreme Court Justices Regarding Certification of Questions of Law* 12 (Am. Judicature Society, Nov. 1994) (lodged as Appendix J with the petition). The study includes a table which indicates that, other than the Federal Circuit which certified only one question, the Third Circuit certified the lowest number of questions (six). *Id.* The same study concluded that "[t]he 11th Circuit also certifies questions, or grants certification applications, at a rate (90%) that is higher than any other circuit. In contrast, the 10th Circuit's rate of certification (34%) is the lowest of all circuits." *Id.* A survey of federal judges further confirmed that 30% of Court of Appeals judges were either "somewhat" or "very reluctant" to certify questions while 54% were "willing" or "very willing" to certify questions. *Id.* Likewise, 39% of district judges surveyed were either "very" or "somewhat" reluctant to certify questions. *Id.* Perhaps most telling, the report discovered that "[o]f the 13 federal Courts of Appeal, only four have rules of procedure governing the certification of questions of law" (the Second, Fourth, Seventh and Tenth Circuits). *Id.* at 4.

Contrary to Ford's assertion that certification is an inherently undesirable and inefficient process, *see* Br. in Opp. 23-24, another survey/study concluded that:

> A large majority of federal judges found the process to be a convenient and appropriate method for ascertaining controlling state law. The state judges agreed that certification affords the state courts their appropriate decisionmaking role. * * * The empirical study demonstrated, in short, that problems associated with certification probably have been overstated, while the promised benefit of the process in a federal-state context has been substantially achieved in those cases in which certification was tried.

J. Corr & I. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 Vand. L. Rev. 411, 457-58 (1988).

Indeed, federal Court of Appeals decisions demonstrating a receptiveness to the certification process in the context of a choice of law issue that was not in the least exhibited by the district court or the Eighth Circuit in this case are not uncommon. For example, in *Boardman v. United Services Auto. Ass'n*, 742 F.2d 847 (5th Cir. 1984), the Fifth Circuit considered a Mississippi choice of law question in a diversity case involving an uninsured motorist who was injured in Mississippi but whose father had been issued an insurance policy in Nebraska. The resolution of the choice of law issue would determine whether the plaintiff's claim was absolutely barred, as in this case. Despite acknowledging that it could "come up with a fair prediction of what Mississippi would hold," *id.* at 851, regarding the choice of law issue, the Fifth Circuit concluded that certification of the question to the Mississippi Supreme Court was essentially compelled. After noting that the issue was of great importance to the State of Mississippi, the Fifth Circuit observed that "[w]ith facilities for positive determination so readily at hand through certification, it is for Mississippi — not us as a fortuitous momentary spokesman — to make its own policy decisions." *Id.* at 851. The Fifth Circuit then declared that:

> Concerned that we uphold our *Erie* duty to apply the substantive law of the forum state in a diversity case, we seek guidance from the one court constitutionally entitled to supply it. Indeed, as this case centers upon the strength of local Mississippi policies this course *is mandated by the principles of federalism.* Federal courts should hesitate to "trade judicial robes for the garb of a prophet" when an available certification procedure renders the crystal ball or divining rod unnecessary.

Id. (emphasis added) (quoting Chief Judge John Brown, *Fifth Circuit — Certification — Federalism in Action*, 7 Cum. L. Rev. 455 (1977)) (footnote omitted).

More recently, the Second Circuit also demonstrated much more receptiveness to the certification process in a products liability/choice of law case than did the Eighth Circuit in this case. In *Baxter v. Sturm, Ruger & Co.*, 13 F.3d 40 (2d Cir. 1993), a diversity suit filed in Connecticut, an Oregon resident was injured by a firearm designed and manufactured in Connecticut. In addressing whether Oregon law or Connecticut law would control the substantive issues,[4] the Second Circuit *sua sponte* certified the choice of law question to the Connecticut Supreme Court.[5] In other words, when confronted with the state law

4. The choice of law was between Oregon's ultimate products liability statute of repose (Nebraska type) and Connecticut's useful safe life statute (Minnesota statute). Pet. App. 68a - 73a. Thus, the Second Circuit faced precisely the same choice of law question that petitioner squarely placed before the District Court and the Eighth Circuit in this case. *See* Pet. App. 5a - 9a, 32a, 48a - 52a.

5. Interestingly, in doing so, the Second Circuit panel unanimously chose to certify the potentially dispositive Connecticut choice of law questions even

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question whether a plaintiff's understandable and intelligent forum selection was "blatant forum shopping" or "no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations," *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1983), the Eighth Circuit and the Second Circuit adopted completely different approaches in determining the answer. In reaching its decision to certify the state law questions, the Second Circuit observed that choice of law questions generally involve "policy choices" that are "best resolved" by the state courts. 13 F.3d at 43.

In this case, petitioner respectfully contends that if it was not an abuse of discretion for the district court and the Eighth Circuit to decline to certify the potentially dispositive Minnesota choice of law question to the Minnesota Supreme Court, then *no* lower federal court's decision not to certify state choice of law questions to the state courts will ever constitute an abuse of discretion. Surely this Court's decision in *Lehman Bros. v. Schein* neither compels nor contemplates that result. Petitioner respectfully suggests that twenty years of non-intervention by this Court in this particular area of the law, in light of the divergent approaches adopted by the Courts of Appeal and the importance of the federalism issues raised in this context, is long enough. It is time for the Court to provide the lower federal courts and litigants in those courts with additional guidance regarding the circumstances in which it is appropriate, and perhaps even essential, for federal courts to give state courts the first opportunity to resolve important, unsettled issues of state law.

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though the district judge, Judge Cabranes—whom Ford approvingly quotes as condemning the certification process, *see* Br. in Opp. 24—had attempted to resolve the state law questions himself without resort to certification.

II. The Equities In This Case Favor Granting Plenary Review.

Petitioner chose a Minnesota state court forum for her lawsuit. It was Ford, not petitioner, who brought this suit into federal court. Ford's complaints that certification of state law questions by the federal courts "could thus force substantial delays in the resolution of federal suits and burden their opponents with attendant costs," Br. in Opp. 23, ring absolutely hollow in this case. Ford, not petitioner, chose the federal forum for this state law case.

Moreover, petitioner's young son died after being run over by Ford's product. Potential liability in this context is no surprise to Ford. The design defect that created the potential for thousands of Ford automatic transmissions to shift from "Park" to "Reverse" has been well-established and well-litigated. *See, e.g., Ford Motor Co. v. Nowak*, 638 S.W.2d 582, 593-96 (Tex. Ct. App. 1982) (reviewing the extensive evidence regarding the design defect and Ford's knowledge of it in concluding that the jury was justified in awarding $4 million in punitive damages); *Ford Motor Co. v. Bartholomew*, 297 S.E.2d 675 (Va. 1982); *Lenhardt v. Ford Motor Co.*, 683 P.2d 1097 (Wash. 1984); *Kallio v. Ford Motor Co.*, 391 N.W.2d 860 (Minn. App. 1986), *aff'd en banc*, 407 N.W.2d 92 (Minn. 1987); *Farrell v. Ford Motor Co.*, 501 N.W.2d 567 (Mich. Ct. App. 1993). This defect almost resulted in the federal government ordering one of the largest automobile recalls in this country's history.[6] Petitioner and her family, on the other hand, incurred substantial medical expenses in connection

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6. *See, e.g.*, National Highway and Traffic Safety Administration, Office of Defects Investigation, Associate Administrator for Enforcement, *Investigative Report — Phase I — C8-02 — Alleged Automatic Transmission Gear Selector System Malfunctions in 1970-1979 Ford Built Vehicles Equipped with C-3, C-4, C-6, FMX, and JATCO Automatic Transmissions* (June 1980); United States General Accounting Office, *Auto Safety — Effectiveness of Ford Transmission Settlement Still at Issue* (June 1986).

with Jeremy's injuries and his eventual death. Unquestionably, the family also has suffered considerable grief and mental anguish over the loss of Jeremy. Ford's resort to caustic attacks on the petitioner[7]—in a case where a known defect in its product resulted in the death of petitioner's young son—strongly suggests that Ford desires to avoid liability and further publicity in this case at all costs.

In summary, this case clearly presents important and recurring legal issues regarding the complex relationship between the state and federal courts in our federal system. These issues were raised and properly preserved at each stage of this litigation. Significant evidence and authority suggests that the lower federal courts have adopted widely varying approaches in dealing with these issues. For more than twenty years now, this Court has not spoken directly to these issues in the context presented in this case. With all due respect, petitioner urges this Court to take this opportunity to address and clarify the standards the federal courts are to employ in analyzing requests for certification of state law questions to the state courts. The issue is one whose time has come.

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7. *See* Br. in Opp. at 18 ("petitioner both seriously misrepresents Minnesota law and greatly exaggerates the importance the court of appeals accorded to her forum shopping tactics"; "Petitioner plays fast and loose with the Minnesota cases"; "petitioner absurdly contends"), 20 (petitioner's contention "is frankly absurd"), 21 (petitioner engaged in "blatant forum shopping"). In this vein, petitioner also notes that Ford's well-known counsel quotes a book of which he is a co-author—as authority for a proposition that supports Ford's position before this Court—without a footnote or parenthetical indicating to the Court counsel's status as a co-author of the quoted publication. *See* Br. in Opp. 11 (quoting from "R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* 183 (7th ed. 1993)") (emphasis added).

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in the petition for a writ of certiorari, petitioner respectfully requests that the Court grant plenary review of both questions presented.

Respectfully submitted,

WILLIAM H. McDONALD
WOOLSEY, FISHER,
WHITEAKER & McDONALD
300 South Jefferson
Suite 600
P.O. Box 1245
Springfield, MO 65801
(417) 869-0581

DAVID F. HERR
MASLON EDELMAN
BORMAN& BRAND,
a Professional Limited
Liability Partnership
3300 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-4140
(612) 672-8350

ERIC W. KRUGER
Counsel of Record
RICKERSON & KRUGER
11422 Miracle Hills Drive
Suite 401
Omaha, NE 68154-4459
(402) 498-8686

Of Counsel:
STEPHEN R. McALLISTER
UNIVERSITY OF KANSAS
SCHOOL OF LAW
Green Hall
Lawrence, KS 66045
(913) 864-4550